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Thomas W. Studwell

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# LATIN AMERICAN COMPETITION LAW IN THE TWENTY-FIRST CENTURY: A PRACTICAL GUIDE

Thomas W. Studwell\*

## I. INTRODUCTION

THE final decade of the twentieth century witnessed a sea change in the economic legislation of Latin America. After surviving the inefficiencies of state-controlled economies in the 1970s, followed by the debt crisis and the ensuing economic stagnation throughout the 1980s, Latin America embarked on a path of rapid trade liberalization at the beginning of the 1990s. In a trend that accelerated across the region throughout the first half of the decade, country after country reduced import tariffs, removed price controls and foreign exchange restrictions, privatized state-owned businesses, and dismantled statutory barriers to foreign investment. In their place, governments in the region began to adopt new legislation or revive existing legislation that encouraged the operation of free market principles. Foremost among the new laws were those designed to foment and safeguard free competition. By the turn of the century, all major, and several of the smaller, Latin American jurisdictions had implemented competition laws and established agencies to regulate and enforce them and many of these agencies have already assumed visible roles in their domestic economies, censuring anticompetitive practices and blocking or reshaping large business combinations.<sup>1</sup>

This article provides a brief overview of the competition laws in effect in the major Latin American countries at the beginning of the twenty-first century. It is intended to provide lawyers, whose practice includes advis-

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\* Thomas W. Studwell is a partner in the New York office of Baker & McKenzie. He acknowledges with gratitude the able assistance of Yasmin Roman, J. Carlos Real, and Matthew Poulter in the preparation of this article.

1. Summaries of rulings and administrative actions of a number of countries, as well as the text of the relevant laws and regulations, are available on the respective competition agency's websites. See, e.g., Argentina, *Comisión Nacional de Defensa de la Competencia*, at <http://www.mecon.gov.ar/cndc/home.htm> (last visited Nov. 3, 2004); Brazil, *Conselho Administrativo de Defesa Econômica*, at [www.cade.gov.br](http://www.cade.gov.br) (last visited Nov. 3, 2004); Chile, *Fiscalía Nacional Económica de Chile*, at <http://www.fne.cl/superior.html> (last visited (Nov. 3, 2004); Mexico, *Comisión Federal de la Competencia*, at [www.cfc.gob.mx/](http://www.cfc.gob.mx/) (last visited Nov. 3, 2004); Peru, *Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual*, at [www.indecopi.gob.pe/](http://www.indecopi.gob.pe/) (last visited Nov. 3, 2004); Venezuela, *Superintendencia para la Promoción y Protección de la Libre Competencia*, at [www.procompetencia.gov.ve](http://www.procompetencia.gov.ve) (last visited Nov. 3, 2004).

ing on transactions, investments, or trade in the region, a practical guide to Latin American competition law. It does not, however, present an in-depth analysis of the competition law of any single jurisdiction or a comparative study of the various laws of the region and their diverse theoretical underpinnings. It is similarly not intended to serve as a substitute for the advice of local counsel with respect to the content or application of any particular law or regulation.

Specifically, this article reviews the competition laws that are now in effect in Argentina, Brazil, Chile, Colombia, Mexico, Peru, and Venezuela. These jurisdictions were chosen primarily for the size of their domestic economies and their respective volumes of international trade and inbound direct investment. While other countries in the region have adopted similar legislation,<sup>2</sup> and certain regional legislative initiatives are currently under way as well,<sup>3</sup> they are beyond the scope of the present article.

For each jurisdiction, this article examines the statutory treatment of two broad areas addressed by competition law: (1) anticompetitive conduct in the marketplace; and (2) mergers, acquisitions, and other business concentrations. Although these regulations are of primary concern to domestic enterprises, they can also be important to international counsel in at least two ways. First, the business practices of multinational subsidiaries are subject to the antitrust restrictions that now govern in the jurisdictions examined herein. An important role of international compliance officers in large corporations is to monitor compliance of the corporation's far-flung affiliates with the competition laws of their jurisdiction of operations. Knowledge of these laws is imperative. Second, the laws of many countries purport to apply directly to agreements or concerted actions of multinational companies that are made or taken outside of the country if the agreement or action has an anticompetitive effect in the country.<sup>4</sup> While the principal types of restricted conduct, not surprisingly, are much the same across the region – to wit, price fixing, market division, limitation of production, bid rigging, and tying – the countries

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2. See *Constitución Política del Estado* arts. 134, 142, 233 (Bol.); *Ley de Inversiones*, Law No. 1182 of Sept. 17, 1990 (Bol.); *Promoción de la Competencia y Defensa Efectiva del Consumidor y su Reglamento*, Law No. 7472 of Dec. 20, 1994 (Costa Rica); *Constitución de la República Dominicana* art. 8 (12); *CÓDIGO PENAL* arts. 419-20 (Dom. Rep.); *Normas Sobre la Defensa de la Competencia*, Law No. 29 of Feb. 1, 1996 (Pan.); *Servicios Públicos y Privados, Seguridad Pública y Condiciones en las que se Desarrollan las Actividades Productivas*, Law No. 17.243 of June 29, 2000, arts. 13-15 (Uru.); *Presupuesto Nacional*, Law No. 17.296 of Feb. 21, 2001, arts. 157 - 58 (Uru.); *Decreto sobre Defensa de la Competencia of Mar. 15, 2001* (Uru.).

3. See Andean Group: Commission Decision 285 – *Norms to Prevent or Correct Competitive Distortions Caused by Practices that Restrict Free Competition*, Mar. 21, 1991, 32 I.L.M. 162; *Protocol VIII: Competition Policy, Consumer Protection, Dumping and Subsidies* (Protocol Amending the Treaty Establishing the Caribbean Community), Mar. 14, 2000, at [www.caricom.org/archives/protocolviii.htm](http://www.caricom.org/archives/protocolviii.htm).

4. For a discussion of the extraterritorial prosecution of price-fixing, see Donald C. Klawiter, *Cartel Enforcement in the Post-ADM, Post-Enron World*, in *ANTITRUST REVIEW OF THE AMERICAS* 2003 6 (4th ed. 2002).

differ as to whether particular conduct is illegal per se or rather, if it is illegal only if it has an anticompetitive effect. This difference is attributable at least in part to the antitrust law –that of the United States or the European Community – that has had the most influence on the legislation of the country in question.<sup>5</sup>

It is perhaps in the area of merger controls that the antitrust laws in Latin America have changed most dramatically over the past decade. At the beginning of the 1990s, lawyers representing a company planning a merger, acquisition, joint venture, or other business combination in the Latin American region had little cause for concern that the proposed transaction might violate local competition laws. Ten years later, however, one of the same lawyer's first, and most important, responsibilities is to examine possible consequences under the antitrust laws of each jurisdiction in which the transaction is likely to have an effect. As will be seen, the majority of the Latin American jurisdictions now require some form of notification or approval for most sizeable business concentrations.

## II. ARGENTINA

### A. LEGISLATION AND SCOPE

Although Argentine antitrust law dates back to the early decades of the twentieth century, the first modern antitrust legislation, Law 22,262, was enacted in 1980 to prohibit acts or conduct that limit, restrict, or distort competition or market access, or constitute an abuse of a dominant market position.<sup>6</sup> In 1999, Law 22,262 was replaced by Law 25,156, the Defense of Competition Act (the Act), which introduced major changes, particularly the establishment of merger control rules and the creation of a National Competition Tribunal (the Tribunal) that has the power to resolve conflicts and impose sanctions.<sup>7</sup> The Act applies to individuals or legal entities carrying out economic activities in Argentina, and those performing such activities outside the country, insofar as their acts, activities, or agreements produce effects in the Argentine market.<sup>8</sup>

### B. REGULATED CONDUCT

The Act prohibits the following conduct to the extent that it has, as its purpose or effect, limitation, restriction, or distortion of competition or if it constitutes an abuse of a dominant market position:

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5. See Shanker A. Singham, *Shaping Competition Policy in the Americas: Scope for Transatlantic Cooperation?*, 24 BROOK. J. INT'L L. 363 (1998).
  6. Law No. 22,262, Aug. 1, 1980 (Arg.), available at <http://infoleg.mecon.gov.ar/scripts/1/busquedas/cnsnorma.asp?tipo=Ley&nro=22262>.
  7. Law No. 25,156, art. 58, Sept. 16, 1999, 29233 B.O. 5, amended by Decree No. 396/2001, Apr. 1, 2001 (Arg.), available at <http://infoleg.mecon.gov.ar/txtnorma/60016.htm>. The law provides that, until the Tribunal is established and operating, its functions will be carried out by the existing antitrust agency, the Comisión Nacional de Defensa de la Competencia. *Id.* art. 58.
  8. *Id.* art. 3.

(a) the direct or indirect fixing, agreement, or manipulation of the price of goods or services, or the exchange of information for the same purpose or having the same effect;

(b) the establishing of obligations to limit the production, processing, distribution, purchase or marketing of goods, or the quantity, volume, or frequency of services;

(c) the horizontal division among competitors of territories, markets, customers, or sources of supply;

(d) the agreement or coordination of bids in auctions or competitive bidding procedures;

(e) concerted action to limit or control technical development or investments for the production or marketing of goods and services;

(f) the impeding or exclusion of third parties from entering or remaining in any market;

(g) the direct or indirect fixing or imposition, in concert with competitors or individually, in any manner, of prices and conditions for the purchase or sale of goods, services, or production;

(h) the control of markets for goods or services, through agreements to limit or control research and development or the production of goods or performance of services, or to impede investments in the production or distribution of goods and services;

(i) the subordination of the sale of a good or rendering of a service to the acquisition of another;

(j) the conditioning of a sale or purchase upon an undertaking not to use, acquire, sell or supply goods or services produced, processed, distributed, or marketed by third parties;

(k) the imposition of discriminatory conditions, not based on customary market practice, on the acquisition or disposition of goods and services;

(l) the unjustified refusal to accept firm offers for the sale or purchase of goods and services on market terms and conditions;

(m) the suspension of a dominant monopolistic service to a provider of public services or public interest; or

(n) the selling of products below cost, without a basis in customary market practice, in order to eliminate a competitor in the marketplace or to damage the image, assets or brand value of providers of goods or services.<sup>9</sup>

### C. MERGER CONTROLS

The Act also prohibits economic concentrations that have the purpose or effect of reducing, restricting, or distorting competition in a manner that could damage the general economic interest.<sup>10</sup> For these purposes, an economic concentration is the acquisition of control of one or more

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9. *Id.* art. 2.

10. *Id.* art. 7.

enterprises by means of: (1) merger; (2) transfer of a going concern; (3) transfer of shares or rights giving the acquiror control of, or substantial influence over, the issuer; or (4) any other act or agreement that transfers the assets of an enterprise to one person or economic group or gives such person or group management control of the enterprise.<sup>11</sup>

Economic concentrations must be reported to the National Competition Tribunal if the business volume of the combined entities within Argentina exceeds P\$200,000,000 (approximately US\$69,444,000).<sup>12</sup> Certain transactions are exempt, including: (1) the acquisition of an enterprise of which the acquiror already holds more than 50 percent of the stock; (2) the acquisition of a single Argentine entity by a single foreign entity that did not previously own assets or shares in other Argentine companies; and (3) an acquisition exceeding the threshold, where the acquiror has not completed any acquisition in the same market within the preceding twelve months having an aggregate value exceeding P\$20,000,000 (approximately US\$6,944,400) or within the preceding thirty-six months, having an aggregate value exceeding P\$60,000,000 (approximately US\$20,833,000).<sup>13</sup> If the parties involved in a transaction that is subject to notification fail to notify the Tribunal, the transaction will have no legal effect between the parties or against third parties.<sup>14</sup> Moreover, a party who fails to comply with the notification requirement is subject to a fine of up to P\$1,000,000 (approximately US\$347,000) per day until compliance.<sup>15</sup> Once the Tribunal has been notified, it has forty-five days within which: (1) to approve the transaction; (2) to condition the transaction on compliance with certain requirements; or (3) to prohibit the transaction. If the Tribunal does not do any of these, the transaction will be deemed approved.<sup>16</sup>

The parties to a transaction must notify the Tribunal by submitting a completed questionnaire in which the parties provide financial and background information about the parties, the main characteristics of the transaction, a description of the products and relevant markets, information about substitute products, and manufacturing process information.<sup>17</sup> In addition, the parties must provide in-depth quantitative market information, including the market shares of the parties involved, supply and competitive studies, strategic plans and reports, profitability reports, qualitative market data and projections, production costs, and potential efficiency gains.<sup>18</sup>

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11. *Id.* art. 6.

12. *Id.* art. 8. All U.S. dollar equivalents stated in this article are based on currency conversion rates in effect in January 2004.

13. *Id.* art. 10.

14. *Id.* art. 8.

15. *Id.* art. 46(d).

16. *Id.* arts. 13-14.

17. Res. No. 40/2001, Feb. 22, 2001, 29596 B.O. 12 (Arg.), available at <http://infoleg.mecon.gov.ar/txtnorma/66243.htm>.

18. *Id.*

#### D. SANCTIONS

Sanctions for violations of the Act include:

- (a) cease and desist orders;
- (b) fines ranging from P\$10,000 (approximately US\$3,470) to P\$150,000,000 (approximately US\$52,083,000), taking into account:
  - (1) the losses incurred by all those affected by the prohibited activity;
  - (2) the benefits obtained by those involved in the prohibited activity;
  - (3) the value of the assets of those persons involved in the prohibited activity at the time of the infraction; and (4) whether it is a first or repeat violation – in the case of the latter, the fine will be doubled;
- (c) in cases of abuse of a dominant market position or acquisition or consolidation of a monopoly, the Tribunal can impose conditions upon the behavior of the culpable party to neutralize the practices that distort competition, or to request a competent authority to order the dissolution, liquidation, or division of the entity or entities at fault; or
- (d) fines of up to P\$1,000,000 (approximately US\$347,000) for failure to give merger notification or to abide by certain prejudgment orders set by the Tribunal.<sup>19</sup>

#### E. ENFORCEMENT

The Tribunal is the primary enforcement body under the Act. Article 24 of the Act authorizes the Tribunal to carry out studies, take testimony, perform investigations, hold hearings, and impose sanctions.<sup>20</sup> In addition, the regulations issued under the Act provide that the *Secretaría Nacional de Defensa a la Competencia* (the Competition Secretariat) is the agency that represents the public interest in proceedings before the Tribunal, with the authority to, *inter alia*, conduct certain investigations, request provisional remedies, and file appeals.<sup>21</sup>

### III. BRAZIL

#### A. LEGISLATION AND SCOPE

Brazil's competition legislation is embodied principally in Law 8884 of June 11, 1994, as amended (Law 8884).<sup>22</sup> Law 8884 was enacted as part of Brazil's conversion in the last decade from a closed, state-controlled economy to one based on free-market principles. Although prior to that time, Brazilian law recognized certain broad principles of fair competition, and in fact, the Economic Defense Administrative Council (CADE) had been in existence since 1962, the legal protection of economic compe-

19. Law No. 25.156, art. 46.

20. *Id.* art. 24.

21. Decree No. 89/2001, art. 26, Jan. 25, 2001, 29577 B.O. 1 (Arg.), available at <http://infoleg.mecon.gov.ar/txtnorma/65959.htm>.

22. Lei No. 8.884, de 11 de junho de 1994, amended by Lei No. 9.069/95, Lei No. 9.021/95, Lei No. 9.470/97, Lei No. 9.781/99, Lei No. 9.873/99 & Lei No. 10.149, de 21 de dezembro de 2000, D.O.U. de 21.12.2000, available at <http://www.cade.gov.br/>.

tition had not played a significant role in the Brazilian economy because effective competition was not practicable at that time. Law 8884 prohibits a broad range of anticompetitive conduct, and has transformed CADE into an autonomous, governmental agency with substantial authority to prevent and prosecute anticompetitive behavior and regulate business concentrations.<sup>23</sup>

## B. REGULATED CONDUCT

Law 8884 broadly prohibits all forms of conduct that has the aim or potential effect, even if not attained, of: (1) limiting or prejudicing free competition; (2) dominating the relevant markets of good and services; (3) increasing profits arbitrarily; or (4) abusing a dominant market position. Generally, a company or group is presumed to have a dominant position if it controls 20 percent or more of the relevant market.<sup>24</sup> The law identifies a number of acts that are prohibited if they fall within any of these four types of conduct. A partial list includes acts:

(a) to fix prices and conditions for the sale of a certain product or service in collusion with competitors;

(b) to obtain or otherwise procure the adoption of uniform or concerted business practices among competitors;

(c) to apportion markets for products or services, or for sources of raw materials or intermediary products;

(d) to limit or restrain market access by new companies;

(e) to create barriers to the establishment, operation, or development of a competitor company or a supplier, purchaser, or financier of a certain product or service;

(f) to bar access of competitors to sources of raw materials, equipment, or technology sources, or to channels of distribution thereof;

(g) to require or grant exclusivity in mass media advertising;

(h) to agree in advance on prices or advantages in public or administrative biddings;

(i) to control the market for a certain product or service by means of agreements to limit or control technological research and development or the production of products or services, or to limit investments in the production of products and services or the distribution thereof;

(j) to impose prices or other terms or conditions of sale on distributors, retailers, or representatives of products or services;

(k) to discriminate against purchasers or suppliers of a certain product or service by establishing price differentials or discriminatory conditions of sale;

(l) to refuse to sell a certain product or service in accordance with regular business practices and policies;

(m) to sell products below cost without justification; and

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23. *See id.*

24. *Id.* art. 20.



(n) to condition the sale of one product or service on the acquisition of another.<sup>25</sup>

### C. MERGER CONTROLS

With respect to merger controls, Law 8884 requires that any acts that may limit or restrain free competition or result in the control of a relevant market, be submitted to CADE for review.<sup>26</sup> This includes acts intended to increase economic concentration, such as mergers, acquisitions, and joint ventures, where: (1) the combined entity would control 20 percent or more of the relevant market; or (2) any of the parties has annual worldwide gross revenues, according to its most recent balance sheet, of R\$400,000,000 (approximately US\$141,343,000) or more.<sup>27</sup> CADE has interpreted the R\$400,000,000 threshold as applying to the revenues of the entire corporate group to which the respective party belongs, even if members of the group are located outside of Brazil.<sup>28</sup> Law 8884 applies to acts wholly or partially performed in Brazil, or which have or may have effects in Brazil.<sup>29</sup> Consequently, the law would be deemed to apply to a merger or acquisition involving two non-Brazilian companies, if one or both of them have subsidiaries, branches, or business operations in Brazil, so long as one of the parties meets the revenue threshold.

Filing with CADE is required no later than fifteen days after the transaction date.<sup>30</sup> CADE has interpreted the transaction date as the date of signing of the "first binding document" between the parties, but has not defined binding document for this purpose.<sup>31</sup> Some commentators recommend that parties adopt a conservative interpretation, and assume that any document, including a letter of intent or memorandum of understanding which contains language that could even remotely be considered binding, will constitute a binding document for CADE filing purposes.<sup>32</sup> Failure to file may result in fines ranging from 60,000 UFIR (*Unidades Fiscais de Referência*) to 6,000,000 UFIR (approximately US\$22,560 to US\$2,256,000).<sup>33</sup>

Law 8884 further requires the parties that are involved in a reportable transaction, to submit certain documents and information to the Secretariat of Economic Rights (SDE), which provides copies to CADE and to the Secretariat of Economic Monitoring (SEAE). If the transaction is not complex, the only documents the parties must submit are a power of attorney, all relevant binding agreements, and any subsequent agree-

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25. *Id.* art. 21.

26. *Id.* art. 54.

27. *Id.* art. 54, § 3.

28. THE GLOBAL MERGER NOTIFICATION HANDBOOK 149 (David J. Laing et al., eds., Cameron May 3d ed. 2002).

29. Lei No. 8.884, art. 2.

30. *Id.* art. 54, § 4.

31. Resolução No. 15, de 19 de agosto de 1998, D.O.U. de 28.08.1998, available at <http://www.cade.gov.br/>.

32. THE GLOBAL MERGER NOTIFICATION HANDBOOK, *supra* note 28, at 149-150.

33. Lei No. 8.884, art. 54, § 5.

ments that formalized the transaction. If these documents are written in a foreign language, the parties must submit Portuguese translations. If the SDE considers the transaction to be complex, the parties must provide detailed financial and background information about themselves, their parent companies, the transaction in question, and the relevant product markets.<sup>34</sup>

CADE has 120 days from the date of filing to issue its approval or denial of the transaction, during the first sixty days of which CADE receives advisory opinions from SDE and SEAE.<sup>35</sup> This period may be extended if CADE requests further information. If CADE denies approval of the transaction, it is empowered, if the transaction has already been consummated, to order measures to cure the economic harm caused by the transaction, including the partial or complete unwinding of the transaction, the spin-off or sale of assets, and the cessation of infringing activities.<sup>36</sup>

#### D. SANCTIONS

Violators of Law 8884 are subject to the sanctions specified therein in Article 23. The sanctions include the following:

(a) for companies, a fine equaling the greater of 1 to 30 percent of the company's gross pre-tax revenue as of the latest financial statements, or the profit obtained from the underlying violation;

(b) for managers directly or indirectly liable for their company's violation, a fine from 10 to 15 percent of the fine imposed on the company;

(c) for individuals, when not feasible to use the gross revenues, a fine ranging from 6,000 to 6,000,000 UFIR (approximately US\$2,250 to US\$2,256,000).<sup>37</sup>

Furthermore, fines are doubled for repeated violations.

Article 24 of Law 8884 also provides for the following sanctions whenever the gravity of the violation or public interest requires:

(a) a half-page notice in the publication of the court's choosing for two consecutive days, published for one to three consecutive weeks, at the violator's expense;

(b) ineligibility for official financing or participation in bidding processes involving the federal, state, municipal, or Federal District authorities for a period of five years or more;

(c) publication of the violator's name on the Brazilian Consumer Protection List; or

(d) the partial suspension of the company's activities.<sup>38</sup>

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34. For a more detailed list of required items, see THE GLOBAL MERGER NOTIFICATION HANDBOOK, *supra* note 28, at 150.

35. Lei No. 8.884, art. 54, § 6.

36. *Id.* § 9.

37. *Id.* art. 23; THE GLOBAL MERGER NOTIFICATION HANDBOOK, *supra* note 28, at 150.

38. Lei No. 8.884, art. 24.

## E. ENFORCEMENT

In addition to CADE, two other governmental bodies are involved in enforcing Brazilian competition law: (1) SDE, an agency of the Ministry of Justice, is involved in the investigation process; and (2) SEAE, an agency of the Ministry of Finance, is responsible for issuing economic opinions. The findings of the SDE and the SEAE are not binding on CADE.<sup>39</sup>

In recent years, there has been a dramatic increase in the number of CADE decisions associated with the new competitive environment. For instance, from 1999 to 2000, the number of cases decided by CADE increased by 67 percent. Moreover, cases involving merger controls have recently come to dominate CADE's caseload – to wit, while non-merger control cases represented 77 percent of all antitrust cases during the period from 1996 through 1998, 82 percent of the cases decided by CADE in 2001, were merger control cases.<sup>40</sup>

## IV. CHILE

## A. LEGISLATION AND SCOPE

Chile's competition policy is embodied in Decree No. 211 of 1973, as amended and restated by Decree No. 511 of 1980, and further amended in 1999 and 2002 (Decree 211).<sup>41</sup> Decree 211 prohibits all acts and agreements that tend to impede free competition.<sup>42</sup> To implement and enforce that principle, Decree 211 created Regional and Central Preventative Commissions, as competition authorities of first instance, and a Resolutive Commission, as the final competition arbiter.<sup>43</sup> Decree 211 also established the National Economic Prosecutor's Office, which is responsible for bringing criminal prosecutions for violations of it.<sup>44</sup>

## B. REGULATED CONDUCT

Decree 211 identifies the following as acts or agreements that tend to impede free competition:

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39. *Id.* arts. 3-14.

40. Gesner Oliveira, *Antitrust Policy in Brazil: Recent Trends and Challenges Ahead*, 4 ECON. PERSP., Feb. 1999, at 23, 23 (1999), at <http://usinfo.state.gov/journals/ites/0299/ijee/ijee0299.htm>; THE GLOBAL MERGER NOTIFICATION HANDBOOK, *supra* note 28, at 148.

41. Decree No. 211 of Dec. 22, 1973 (Chile), *amended by* Decree No. 511 of Oct. 27, 1980 (Chile), Law No. 19,610 of May 19, 1999 (Chile), & Law No. 19,806 of May 31, 2002 (Chile).

42. *Id.* tit. I, art. 1.

43. *Id.* art. 6.

44. *Id.* tits. II, IV. In May 2002, a bill was presented to the Senate that would amend Decree 211 by, *inter alia*, eliminating the Preventative Commissions and replacing the Resolutive Commission with a new Competition Defense Tribunal. A text of the bill is available on the website of Fiscalía Nacional Económica de Chile (the National Economic Prosecutor's Office), at [www.fne.cl](http://www.fne.cl).

- (a) those relating to production, such as quotas, reductions or suspensions;
- (b) those relating to transportation;
- (c) those relating to marketing or distribution, wholesale, or retail, such as quotas, market division, and exclusive distribution arrangements;
- (d) those involving the determination of prices of goods or services;
- (e) those affecting the right to work or the freedom of workers to organize, assemble, or negotiate collectively; and
- (f) generally, any arbitrary act or agreement having the purpose of eliminating, restricting, or impeding competition.<sup>45</sup>

### C. MERGER CONTROLS

While Decree 211 does not expressly regulate mergers, acquisitions, joint ventures, or other business combinations or establish mandatory pre- or post-merger notice requirements, those transactions that have significant anticompetitive effects may nevertheless violate Decree 211, and thus, be subject to sanctions thereunder, including fines, remedial measures, and even criminal prosecution. For this reason, parties to large business combinations, particularly in critical economic sectors, occasionally seek advisory opinions from Chile's antitrust authorities. Because such a request may trigger a lengthy investigation by the authorities, with a consequent delay of the transaction, however, it is advisable to consult with knowledgeable counsel before proceeding, as the likelihood of approval or denial depends on the size, complexity, and potential effects of each transaction.

### D. SANCTIONS

Decree 211 contemplates various remedies for violations of its competition policy. Depending on the nature of the conduct or agreement in question, the antitrust authorities may: (1) order the modification, suspension, or termination of the agreement; (2) temporarily freeze prices of the goods or services involved; (3) order the dissolution or modification of the bylaws of one or more of the parties; (4) bar individual violators from holding executive positions; (5) impose fines of up to 10,000 Tax Units (*Unidades Tributarias*) (approximately US\$518,800);<sup>46</sup> and (6) bring criminal proceedings against the violators.<sup>47</sup>

### E. ENFORCEMENT

Chile's Preventative Commissions, Resolutive Commission, and National Economic Prosecutor's Office have been actively enforcing Decree 211 in the thirty years since its enactment. Their proceedings, decisions and resolutions concerning regulated conduct, published periodically by

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45. Decree No. 211, tit. I, art. 2.

46. The Unidad Tributaria is approximately P\$29,800 at this writing.

47. Decree No. 211, art. 17.

the agencies, constitute a well-developed body of Chilean competition law.<sup>48</sup>

## V. COLOMBIA

### A. LEGISLATION AND SCOPE

Colombia's primary antitrust statute is Law 155 of December 24, 1959, as amended to date (Law 155), which prohibits all "contracts or agreements which directly or indirectly have the purpose of limiting production, supply, distribution or consumption of raw materials, products, merchandise or services, national or foreign, and, in general, all types of practices, procedures or systems tending to limit free competition and maintain or determine inequitable prices."<sup>49</sup> In addition, Columbia has issued a number of additional laws, rules, and regulations to implement and supplement the provisions of Law 155, particularly Decree 1302 of 1964 (Decree 1302),<sup>50</sup> Decree 2153 of 1992 (Decree 2153),<sup>51</sup> and Superintendent of Industry and Trade Circular Letter 10 of 2001 (Circular 10).<sup>52</sup>

### B. REGULATED CONDUCT

Decree 2153 prohibits contracts, agreements, concerted practices, or conscious parallel conduct among two or more enterprises if they have as their purpose or effect:

- (a) fixing prices directly or indirectly;
- (b) establishing discriminatory sale or marketing conditions for third parties;
- (c) dividing markets among producers or distributors;
- (d) assigning production or supply quotas;
- (e) assigning, dividing, or restricting sources of supply of resources;
- (f) limiting technical development;
- (g) conditioning the supply of a product upon the acceptance of additional obligations extraneous to the purpose of the transaction;
- (h) withholding production of goods or services or affecting their level of production; and
- (i) collusion or price fixing in bidding or allocating contract awards.<sup>53</sup>

Decree 2153 also proscribes: (1) the violation of consumer protection rules regarding advertising; (2) influencing an enterprise to increase the prices of its goods or services or to desist from lowering such prices; (3) the refusal to sell to an enterprise or discriminate against an enterprise in retaliation against its pricing policies; and (4) the abuse of a dominant

48. See generally *Fiscalia Nacional Economica de Chile* website, *supra* note 44.

49. Law No. 155 of Dec. 24, 1959, art. 1 (Col.).

50. Decree No. 1302 of June 1, 1964 (Col.).

51. Decree No. 2153 of Dec. 30, 1992 (Col.).

52. External Circular No. 10 of July 19, 2001 (Col.).

53. Decree No. 2153, art. 47.

position in a market.<sup>54</sup>

With respect to the last proscription, an enterprise has a dominant position if it is able to dictate, directly or indirectly, the terms and conditions of the market.<sup>55</sup> The following conduct constitutes abuse of a dominant position:

(a) predatory pricing, that is, the reduction of prices below cost for the purpose of eliminating, or preventing the entrance or expansion of, one or more competitors;

(b) applying discriminatory terms among comparable suppliers or comparable customers to the disadvantage of one of them;

(c) conditioning the supply of a product upon the acceptance of additional obligations extraneous to the purpose of the transaction;

(d) selling to one buyer on terms different from those offered to another, for the purpose of reducing or eliminating competition; or

(e) selling the same product or service at different prices in different regions of Colombia with the purpose or effect of reducing or eliminating competition, when the price differential does not reflect a variation in the costs of the transaction.<sup>56</sup>

### C. MERGER CONTROLS

Colombia's antitrust legislation requires companies engaged in the same activity of production, supply, distribution, or consumption of a given raw material, product, merchandise, or service to notify the Superintendent of Industry and Trade (the Superintendent) of any proposed merger, consolidation, integration, or acquisition of control of enterprises if: (1) the combined business would represent more than 20 percent of the relevant market, measured in terms of annual sales for the year preceding the year of the transaction; or (2) their combined assets, as of the date of the transaction, exceed 50,000 minimum monthly wage (MMW) (approximately US\$6,065,000).<sup>57</sup> The filing must be made before the closing of the transaction and must include detailed information regarding the parties, the transaction, the relevant market, supply and distribution channels, and other related matters.<sup>58</sup> The Superintendent thereafter has thirty days within which to object to the transaction. If that period expires without any objection by the Superintendent, the parties may proceed to close the transaction.<sup>59</sup>

The parties to a qualified transaction must submit a merger notification to the Superintendent. This notification must contain a detailed description of the goods and services that each of the parties involved in the

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54. *Id.* art. 48.

55. *Id.* art. 45(5).

56. *Id.* art. 50.

57. External Circular No. 10, §§ 2.1.1 and 2.1.2. The minimum monthly wage for 2003 is P\$332,000.

58. *Id.* § 2.1.2.

59. Law No. 155 of Dec. 24, 1959, art. 4, § 2 (Col.); Decree No. 1302 of June 1, 1964, art. 6, (Col.).

transaction produces, imports, distributes, or provides. In addition, the parties must provide a description of the uses of the products, a list of the markets served by the parties, the methods used by each party for transportation, distribution, and sale of the products, and information relating to the competitors of the parties.<sup>60</sup>

#### D. SANCTIONS

The Superintendent is empowered to impose fines of up to 2,000 MMW (approximately US\$242,600) upon companies that violate the competition legislation, and fines of up to 300 MMW (approximately US\$36,400) upon managers, directors, legal representatives, and other parties who authorize, execute, or tolerate such violations.<sup>61</sup> The Superintendent also has the authority to order the rectification, suspension, or termination of infringing conduct or agreements.

#### E. ENFORCEMENT

The Superintendent is responsible for monitoring compliance with the provisions governing free competition. It is responsible for the imposition of fines and for issuing cease and desist orders.<sup>62</sup> In addition, the Office of the Superintendent provides direct assistance to the public by answering inquiries from the general public concerning application of the rules and regulations.<sup>63</sup>

### VI. MEXICO

#### A. LEGISLATION AND SCOPE

While Mexico enacted its first antitrust statute in the 1930s, competition laws were rarely enforced in Mexico until the enactment of the Federal Law of Economic Competition (the Competition Law), which entered into effect on June 22, 1993.<sup>64</sup> The stated purpose of the Competition Law is to protect the process of competition through the prevention and elimination of monopolies, monopolistic practices, and other restrictions on the efficient operation of the markets for goods and services.<sup>65</sup> The law regulates monopolistic practices and economic concentrations and creates a Federal Competition Commission (the Commission) that has broad investigative and enforcement powers.<sup>66</sup>

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60. THE GLOBAL MERGER NOTIFICATION HANDBOOK, *supra* note 28, at 214.

61. Decree No. 2153 of Dec. 30, 1992, art. 4 (Col.).

62. *Id.* art. 11.

63. *Id.* §§ 11, 13.

64. "*Ley Federal de Competencia Económica*," D.O., 24 de diciembre de 1992 (Mex.), translated at <http://r0.unctad.org/en/subsites/cpolicy/Laws/Mexico.pdf> [hereinafter *Competition Law*].

65. *Id.* art. 2.

66. *Id.*

### B. REGULATED CONDUCT

The Competition Law prohibits monopolies and conduct that “diminish, impair or prevent competition and free participation in the production, processing, distribution, and marketing of goods and services.”<sup>67</sup> Monopolistic practices are divided into absolute and relative monopolistic practices.<sup>68</sup> Absolute monopolistic practices are defined as agreements or arrangements among competitors that have the purpose or effect of: (1) fixing prices; (2) limiting production or distribution; (3) dividing markets; or (4) rigging public bids. Such agreements and arrangements are null and void.<sup>69</sup>

Relative monopolistic practices are prohibited only if the actor has “substantial power” over the “relevant market.”<sup>70</sup> The latter terms are defined by reference to the presence of certain factors detailed in the Competition Law, including substitutability of goods, distribution and input costs, market share, and the existence of market barriers.<sup>71</sup> Relative monopolistic practices are agreements or combinations that have the purpose or effect of unduly impeding market access to third parties or giving exclusive advantages to certain persons, in the following cases:<sup>72</sup>

(a) between non-competitors: (1) the establishment of exclusive distribution arrangements, whether based on subject matter, geographic territories or time periods, including the allocation of customers or suppliers; and (2) the imposition of obligations not to compete;

(b) the imposition of price or other conditions that distributors or suppliers must observe upon resale of goods or provision of services;

(c) tying arrangements;

(d) the conditions of sales or other transactions on obligations not to deal with certain third parties;

(e) the refusal to deal with certain parties; and

(f) concerted action to pressure or retaliate against customers or suppliers.

### C. MERGER CONTROLS

Restricted economic concentrations are defined as mergers, acquisitions, or other business combinations among or between any persons or enterprises, whether competitors or not, having the purpose or effect of diminishing, damaging, or impeding competition in identical, similar, or substantially related goods or services.<sup>73</sup> The Competition Law identifies certain factors that the Commission must consider in determining whether a concentration violates this prohibition, such as the likely mar-

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67. *Id.* art. 8.

68. *Id.* arts. 9-10.

69. *Id.* art. 9.

70. *Id.* art. 11(I).

71. *Id.* arts. 11-13.

72. *Id.* art. 10.

73. *Id.* art. 16.



ket power or price-fixing abilities of the resulting concentration.<sup>74</sup> The Commission has the power to condition its approval of a proposed concentration on the restructuring of the transaction to avoid anticompetitive consequences, and it is also empowered to undo prohibited concentrations.<sup>75</sup>

Proposed concentrations meeting the following monetary thresholds must be brought to the attention of the Commission prior to their consummation:

(a) transactions having a value in excess of twelve million times the daily minimum wage for the Federal District (DMW), or approximately US\$48,366,000;<sup>76</sup>

(b) transactions involving the accumulation of more than 35 percent of the assets or shares of a person or enterprise with assets or sales exceeding 12 million DMW (approximately US\$48,366,000); or

(c) transactions involving persons or enterprises whose combined assets or yearly sales exceed 48 million DMW (approximately US\$193,463,000) and an accumulation of assets or capital exceeding 4.8 million DMW (approximately US\$19,346,300).<sup>77</sup>

The Commission has a period of forty-five calendar days from the date of the notice or from such later date on which any additional requested information was received, in which to respond. If the Commission does not respond during such forty-five day period, the transaction is deemed approved.<sup>78</sup>

Although there is no strict format for the notification, the Commission prepared a questionnaire to guide the parties. Many companies prepare a formal letter describing the transaction and attach the completed questionnaire and other required documents. The parties must submit certified copies of their by-laws and articles of incorporation, a power of attorney of their legal representatives, and financial statements for the previous fiscal year. They must also submit information showing capital structure and stock participation of each shareholder before and after the transaction, a description of the concentration's objectives and legal actions involved, the names of all persons or companies involved in the transaction, a description of the goods and services of each party (including their market shares), the names and market shares of international and Mexican competitors, and the location of the facilities and distribution centers of the parties involved.<sup>79</sup>

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74. *Id.* arts. 17-18.

75. *Id.*

76. The DMW is 43.65 Pesos as of January 1, 2003.

77. *Competition Law*, art. 20.

78. *Id.*

79. THE GLOBAL MERGER NOTIFICATION HANDBOOK, *supra* note 28, at 514.

#### D. SANCTIONS

The Commission is empowered to levy fines of up to 1,500 DMW (approximately US\$6,050) per day, for noncompliance with the Commission's orders.<sup>80</sup> In addition to being obligated to cease the prohibited practices or divest prohibited concentrations, violators may also be subject to civil and criminal penalties, including fines in the following amounts:<sup>81</sup>

(a) up to 375,000 DMW (approximately US\$1,511,400) for absolute monopolistic practices;

(b) up to 225,000 DMW (approximately US\$906,900) for prohibited relative monopolistic practices or prohibited economic concentrations;

(c) up to 100,000 DMW (approximately US\$403,000) for failure to provide the Commission with prior notice of economic concentrations, where required;

(d) up to 7,500 DMW (approximately US\$30,200) for individuals directly participating in prohibited monopolistic practices or concentrations in their capacity as representatives of legal entities; and

(e) in serious cases of any of the above violations, the higher of 10 percent of the violator's annual sales or 10 percent of its assets.

The Competition Law also gives private parties an express right of action to bring ordinary civil suits for damages.<sup>82</sup> In order to be able to bring such an action, however, the plaintiff must have previously given evidence of its alleged damages in the administrative proceedings before the Commission. The judge may consider the Commission's estimation of the plaintiff's alleged damages. The Competition Law expressly denies any private right to bring a judicial or administrative action based on the Competition Law (that is, alleging damages due to violations thereof), except for the foregoing right of action established by the Competition Law.

#### E. ENFORCEMENT

As the agency responsible for enforcing the Competition Law, the Commission has broad investigative and enforcement powers. It may institute administrative proceedings on its own initiative and, at the request of third parties, investigate and resolve such cases, and enforce its orders through administrative penalties. It may also bring cases of a criminal nature to the attention of the public prosecutor or issue its own advisory opinions.<sup>83</sup>

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80. *Competition Law*, art. 34.

81. *Id.* arts. 35, 37.

82. *Id.* art. 38.

83. *Id.* arts. 24, 37.

## VII. PERU

### A. LEGISLATION AND SCOPE

Peru's competition policy is governed by Decree No. 701 of November 5, 1991 (Decree 701), which "is intended to eliminate the monopolistic, controlling and restrictive practices affecting free competition in goods production and commercialization and service delivery, allowing thus free enterprise to develop in the best interests of users."<sup>84</sup>

### B. REGULATED CONDUCT

Decree 701 prohibits acts or behaviors that constitute abuse of a dominant market position or limit, restrain, or distort free competition.<sup>85</sup> Acts of abuse of a dominant position include: (1) the unjustified refusal to satisfy demand for purchase or acquisition of goods or services; and (2) the application of discriminatory terms for similar services that place some competitors at a disadvantage with regards to others.<sup>86</sup>

Anticompetitive practices include the following:

- (a) direct or indirect collusion among competitors to fix prices or other terms of trade;
- (b) division of the market or supply sources;
- (c) application of production quotas;
- (d) agreement upon product quality when it does not relate to technical standards;
- (e) application in business practices of discriminatory terms for similar services which place some competitors at a disadvantage with regards to others; and
- (f) collusion for limits or controls on production, technical development, or investment.<sup>87</sup>

### C. MERGER CONTROLS

With the exception of the electricity sector, Peru has not enacted legislation regulating mergers, acquisitions, or other economic concentrations. The Electricity Sector Antitrust Law of 1997 requires that companies engaged in the generation, transmission, or distribution of electricity obtain the approval of the Commission on Free Competition (INDECOPI) prior to consummating a merger, acquisition, or other concentration transaction if the parties to the transaction jointly control 15 percent of the relevant market if the transaction is horizontal (that is, among competitors), or 5 percent of any of the relevant markets if the transaction is vertical (that is, among parties at different levels of the production-transmission-

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84. *Contra Las Practicas Monopolicas, Controlistas y Restrictivas de la Libre Competencia*, Legislative Decree No. 701 of Nov. 7, 1991, art. 1 (Peru).

85. *Id.* art. 3.

86. *Id.* art. 5.

87. *Id.* art. 6.

distribution chain).<sup>88</sup> A transaction requiring approval that is carried out without approval has no legal effect, and may result in fines of up to 10 percent of the sales or gross revenues of the violator(s) for the prior year.<sup>89</sup>

#### D. SANCTIONS

INDECOPI is empowered to impose the following fines for abuse of dominant position and other anticompetitive practices prohibited by Decree 701:

(a) a fine of up to 1,000 Unidades Impositivas Tributarias (UITs) (approximately US\$898,550), provided that it does not exceed 10 percent of gross sales or income of the violator in the period immediately preceding INDECOPI's decision;

(b) if the violation is determined to be very serious, a fine greater than 1,000 UITs, provided it does not exceed 10 percent of gross sales or income of the violator in the period immediately preceding INDECOPI's decision; and

(c) each of the firms' legal representatives or directors may be fined up to 100 UITs (approximately US\$89,850) to the extent they are found liable for the violations committed.<sup>90</sup>

In addition, INDECOPI may issue interim orders to modify or terminate infringing behavior, and impose fines from 10 to 100 UITs (approximately US\$8,900 to US\$89,850) for noncompliance with such measures, and it may also initiate criminal proceedings in cases of certain egregious violations.<sup>91</sup>

#### E. ENFORCEMENT

INDECOPI is responsible for ensuring compliance with the competition laws. It has both investigative and enforcement powers.<sup>92</sup>

### VIII. VENEZUELA

#### A. LEGISLATION AND SCOPE

Competition legislation in Venezuela is comprised of the Law to Promote and Protect the Exercise of Free Competition of January 13, 1992 (the Antitrust Law), and the regulations, resolutions, and decisions issued thereunder, particularly Regulation 1 of May 3, 1993, and Regulation 2 of May 21, 1996.<sup>93</sup> The stated objective of the Antitrust Law is "to promote

88. *Ley Antimonopolio y Antioligopolio del Sector Eléctrico*, Law No. 26876 of Nov. 17, 1997, art. 3 (Peru).

89. *Id.* art. 6.

90. Decree 701, art. 23. For 2003, a UIT (*Unidad Impositiva Tributaria*) is 3,100 Nuevos Soles.

91. *Id.* arts. 19, 21.

92. *Id.* art. 8.

93. *Ley Para Promover y Proteger el Ejercicio de la Libre Competencia*, published in OFFICIAL GAZETTE No. 34,880 of Jan. 13, 1992 (Venez.) [hereinafter *Antitrust*]

and protect the exercise of free competition and efficiency to the benefit of producers and consumers, and to prohibit monopolistic, oligarchic conduct and practices, and other measures that could impede, restrict, falsify, or limit the enjoyment of economic freedom."<sup>94</sup> The Antitrust Law is administered by the Office of the Superintendent for the Promotion and Protection of Free Competition (ProCompetencia).<sup>95</sup>

It should be noted that, pursuant to a directive in the new Constitution adopted in 1999, the administration of President Hugo Chavez has presented to Congress a bill comprising a new competition law.<sup>96</sup> Commentators have observed that, were the bill to be promulgated in its current form, the new legislation would create a completely new administrative structure, including a Competition Secretariat and a Competition Defense Court, and require mandatory pre-merger notification of all mergers, acquisitions, and other economic concentrations that exceed specified monetary thresholds.<sup>97</sup> Although the 1999 Constitution required new antitrust legislation to be enacted no later than December 31, 2001, the bill has not yet passed into law, and at this writing, its future is uncertain. Thus, the remainder of the present discussion addresses only the Antitrust Law as now in effect.

#### B. REGULATED CONDUCT

The Antitrust Law broadly prohibits "[c]onduct, practices, agreements, conventions, contracts, or decisions that impede, restrict, falsify, or limit free competition,"<sup>98</sup> and lists a number of specific types of restricted conduct, including: (1) attempting to obstruct the entry of firms, goods, or services into market; (2) manipulating factors of production, distribution, technological development, or investment in a manner harmful to free competition; (3) agreements among members of trade associations, cooperatives, unions, and similar organizations to restrict competition among themselves; (4) agreements or concerted conduct to fix prices, limit production or distribution, divide markets, price discrimination, or tying arrangements; and (5) the abuse of a dominant position.<sup>99</sup>

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Law]; Reg. No. 1 de la *Ley para Promover y Proteger el Ejercicio de la Libre Competencia*, Decree No. 2.775, published in OFFICIAL GAZETTE No. 35.202 of May 3, 1993 (Venez.) [hereinafter *Reg. No. 1*]; Reg. No. 2 de la *Ley para Promover y Proteger el Ejercicio de la Libre Competencia*, Decree No. 1.311, published in OFFICIAL GAZETTE No. 35.963 of May 21, 1996 (Venez.) [hereinafter *Reg. No. 2*], translated at <http://www.procompetencia.gov.ve/legislacion.html>.

94. *Antitrust Law*, art. 1.

95. *Id.* art. 19.

96. CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZ. arts. 113, 114; Proyecto de Ley para la Promoción de la Libre Competencia y Eficiencia (submitted to the Venezuelan Congress in 2000).

97. See Bruno Ciuffetelli, *Venezuela: The New Legal Antitrust Framework*, THE BOMCHIL GROUP NEWSLETTER (Dec. 2003), available at <http://www.bomchilgroup.org/vendec02.html>; Juan D. Alfonso, *The Draft Law on the Promotion of Free Competition and Efficiency*, GLOBAL COMPETITION REVIEW, available at <http://www.globalcompetitionreview.com/ara/venezuela.cfm> (last visited Nov. 3, 2004).

98. *Antitrust Law*, art. 5.

99. *Id.* arts. 6-13.

Pursuant to the authority granted by the Antitrust Law,<sup>100</sup> in 1993, the executive branch issued Regulation No. 1, which identified conduct that is generally permissible, such as agreements under (4) above among non-competitors and certain de minimus conduct, and authorized ProCompetencia to issue temporary authorizations and global exceptions to the prohibitions against anticompetitive conduct set out in the Antitrust Law. ProCompetencia may authorize temporary exceptions to the Antitrust Law in specific cases where it takes the view that the anticompetitive impact of the conduct in question is not significant and that such conduct has other aspects that are beneficial to the economy.<sup>101</sup> In no event, however, may authorizations be granted for per se violations among competitors, such as price fixing, limiting production, group boycotts, bid-rigging, and market division.<sup>102</sup> Regulation No. 1 authorizes ProCompetencia to grant global exceptions with respect to specific categories of activities, such as: (1) the uniform application of standard terms and conditions of trade; (2) joint research and development; (3) exclusive supply or purchase agreements; and (4) franchise agreements.<sup>103</sup> Pursuant to that authorization, ProCompetencia published global exceptions applicable to exclusive distribution and supply arrangements<sup>104</sup> and franchise agreements<sup>105</sup> that, in each case, comply with the minimum standards and limitations established in the respective resolution.

### C. MERGER CONTROLS

The Venezuelan competition rules governing mergers, acquisitions, joint ventures, and other economic concentrations are embodied in Article 11 of the Antitrust Law, Regulation No. 2 of 1996, and resolutions issued by ProCompetencia in 1997 and 1999, which contain filing instructions and evaluation guidelines, respectively.<sup>106</sup> Unlike many jurisdictions, Venezuela does not require mandatory notification of transactions.<sup>107</sup> Regulation No. 2 does establish, however, a threshold below which transactions are not reviewable, which is currently set at a combined total annual business volume of the parties to the transaction

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100. *Id.* art. 18.

101. Reg. No. 1 de la Ley para *Promover y Proteger el Ejercicio de la Libre Competencia*, Decree No. 2.775, art. 10, published in OFFICIAL GAZETTE No. 35.202 of May 3, 1993 (Venez.).

102. *Id.* art. 7.

103. *Id.* art. 16.

104. Res. No. SPPLC/036-95 of Aug. 28, 1995, published in OFFICIAL GAZETTE No. 35.801 (Venez.).

105. Res. No. SPPLC/038-99 of July 9, 1999, published in OFFICIAL GAZETTE SUPPLEMENT No. 5.431 (Venez.).

106. Res. No. SPPLC/0006-97 of Apr. 17, 1997, published in OFFICIAL GAZETTE No. 36.209 (Venez.); Res. No. SPPLC/039-99 of July 9, 1999, published in OFFICIAL GAZETTE No. 36.819 (Venez.).

107. This is the case under the current Antitrust Law. As noted above, however, the reform bill before Congress would, among many other changes, introduce a mandatory filing requirement for transactions that exceed the monetary and other criteria that would be established by the law.

of 120,000 Tax Units (approximately US\$1,457,700).<sup>108</sup> In practice, however, parties to large or potentially controversial transactions typically will elect to file a prior notification with ProCompetencia, in view of the agency's statutory authority to impose fines *ex post facto* on the parties to a transaction ProCompetencia subsequently determines to be violative of the Antitrust Law, and even to order the complete or partial unwinding of the transaction.

The standards by which ProCompetencia will evaluate the transaction are spelled out in considerable detail in the agency's 1999 resolution discussed above.<sup>109</sup> ProCompetencia has up to four months from the filing date to rule, and may approve the transaction without qualification, approve it subject to certain conditions, or reject it.<sup>110</sup>

If the parties to a merger decide to submit a notification, they must submit sufficient information for ProCompetencia to determine whether the transaction will have anticompetitive effects in the Venezuelan market. This information includes: (1) the names of the parties; (2) detailed information about the underlying transaction; (3) a description of the relevant markets involved; (4) the parties' sales volumes and market shares; and (5) the names of major competitors.<sup>111</sup> The parties must also provide ProCompetencia with a description of barriers to entry into the relevant markets, the price structure of the relevant markets, and information about raw materials, products, and industrial processes.<sup>112</sup>

#### D. SANCTIONS

Article 49 of the Antitrust Law provides for sanctions for antitrust violations. ProCompetencia can impose fines of up to 10 percent of the value of the violator's sales. This quantity can be raised to 20 percent, and in the case of repeat offenders, the fine will be raised to 40 percent.

#### E. ENFORCEMENT

ProCompetencia is responsible for monitoring and controlling the practices that impede or restrict competition. Its power includes the right to resolve matters, conduct investigations, determine the existence or nonexistence of prohibited practices of conduct, adopt necessary preventive measures, and issue opinions.<sup>113</sup>

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108. Reg. No. 2 de la Ley para *Promover y Proteger el Ejercicio de la Libre Competencia*, Decree No. 1.311, art. 2, published in OFFICIAL GAZETTE No. 35.963 of May 21, 1996 (Venez.); Res. No. SPPLC/14-96 of May 24, 1996, published in OFFICIAL GAZETTE No. 36.000 (Venez.). A Tax Unit for 2003 is equal to Bs.19,400.

109. Res. No. SPPLC/039-99.

110. THE GLOBAL MERGER NOTIFICATION HANDBOOK, *supra* note 28, at 864.

111. *Id.*

112. *Id.*

113. Ley Para Promover y Proteger el Ejercicio de la Libre Competencia, art. 29, published in OFFICIAL GAZETTE No. 34.880 of Jan. 13, 1992 (Venez.).

## ARGENTINA

Regulated Conduct	Merger Controls	Sanctions
<p>to the extent restricts, or is intended to restrict competition or constitutes abuse of a dominant position:</p> <ul style="list-style-type: none"> <li>• fixing, agreement, or manipulation of the price of goods or services, or the exchange of information for the same purpose or having the same effect;</li> <li>• establishing obligations to limit production, processing, distribution, purchase or marketing of goods or the quantity, volume, or frequency of services;</li> <li>• horizontal division among competitors of territories, markets, customers or sources of supply;</li> <li>• agreement or coordination of bids in auctions or competitive bidding procedures;</li> <li>• concerted action to limit or control technical development or investments for the production or marketing of goods and services;</li> <li>• impeding or excluding third parties from entering or remaining in any market;</li> <li>• fixing, imposition or practice, in concert with competitors or individually, in any manner, of prices and conditions for the purchase or sale of goods, services or production;</li> <li>• controlling a markets for goods or services, through agreements to limit or control research and development or the production of goods or performance of services, or to impede investments in the production or distribution of goods and services;</li> </ul>	<ul style="list-style-type: none"> <li>• Notification required if the business volume of the combined entities within Argentina exceeds P\$200,000,000 (approximately US\$69,444,000).*</li> <li>• Exceptions: <ul style="list-style-type: none"> <li>◦ acquiror already holds more than 50% of the stock of the target.</li> <li>◦ the acquisition of a single Argentine entity by a single foreign entity that did not previously own assets or shares in other Argentine companies</li> <li>◦ acquiror has not completed any acquisition in the same market within the preceding 12 months having an aggregate value exceeding P\$20,000,000 (approximately US\$6,944,400) or within the preceding 36 months having an aggregate value exceeding P\$60,000,000 (approximately US\$20,833,000).</li> </ul> </li> <li>• Failure to notify renders the transaction null and void and expose the parties to a fine of up to P\$1,000,000 (approximately US\$347,000) per day until compliance.</li> <li>• Tribunal has 45 days from notification (i) to approve the transaction, (ii) to condition the transaction on compliance with certain requirements or (iii) to prohibit the transaction. If the Tribunal does none of these, the transaction is deemed approved.</li> </ul>	<ul style="list-style-type: none"> <li>• Cease and desist orders</li> <li>• Fines ranging from P\$10,000 (approximately US\$3,470) up to P\$150,000,000 (approximately US\$52,083,000).</li> <li>• Fulfillment of conditions to neutralize the distortive effects on competition</li> <li>• Fines of up to P\$1,000,000 (approximately US\$347,000) per day for those who continue to infringe.</li> </ul>

\* U.S. dollar equivalents based on currency conversion rates in effect in January 2004.



Regulated Conduct	Merger Controls	Sanctions
<ul style="list-style-type: none"><li>• subordinating the sale of a good or rendering of a service for the acquisition of another;</li><li>• conditioning a sale or purchase upon an undertaking not to use, acquire, sell or supply goods or services produced, processed, distributed, or marketed by third parties;</li><li>• imposing discriminatory conditions, not based on customary market practice, on the acquisition or disposition of goods and services;</li><li>• unjustified refusal to accept firm offers for the sale or purchase of goods and services on market terms and conditions;</li><li>• suspension of a dominant monopolistic service to a provider of public services or public interest;</li><li>• selling products below cost, without a basis in customary market practice, in order to eliminate a competitor in the marketplace or to damage the image, assets or brand value of providers of goods or services.</li></ul>		

## BRAZIL

Regulated Conduct	Merger Controls	Sanctions
<ul style="list-style-type: none"> <li>• to fix prices and conditions for the sale of a certain product or service in collusion with competitors;</li> <li>• to obtain or otherwise procure the adoption of uniform or concerted business practices among competitors;</li> <li>• to apportion markets for products or services, or for sources of raw materials or intermediary products;</li> <li>• to limit or restrain market access by new companies;</li> <li>• to create barriers to the establishment, operation, or development of a competitor company or a supplier, purchaser, or financier of a certain product or service;</li> <li>• to bar access of competitors to sources of raw materials, equipment or technology sources, or to channels of distribution thereof;</li> <li>• to require or grant exclusivity in mass media advertising;</li> <li>• to agree in advance on prices or advantages in public or administrative biddings;</li> <li>• to control the market for a certain product or service by means of agreements to limit or control technological research and development or the production of products or services, or to limit investments in the production of products and services or the distribution thereof;</li> </ul>	<ul style="list-style-type: none"> <li>• Notification required if               <ul style="list-style-type: none"> <li>◦ combined entity would have control of 20% or more of the relevant market, or</li> <li>◦ any of the parties has annual worldwide gross revenues, according to its most recent balance sheet, of R\$400,000,000 (approximately US\$141,343,000) or more.*</li> </ul> </li> <li>• Filing required not later than 15 days after the date of signing of the "first binding document".</li> <li>• Failure to file may result in fines ranging from 60,000 UFIR (<i>Unidades Fiscais de Referência</i>) to 6,000,000 UFIR (approximately US\$22,560 to US\$2,256,000).</li> <li>• CADE has 120 days from the date of filing to issue its approval or denial of the transaction, during the first 60 days of which CADE receives advisory opinions from SDE and SEAE.</li> <li>• If approval denied after transaction consummated, CADE may order measures to cure the economic harm caused by the transaction, including the partial or complete unwinding of the transaction.</li> </ul>	<ul style="list-style-type: none"> <li>• For companies – fines ranging from 1-30% of gross pretax revenue</li> <li>• For managers – fine from 10-15% of the fine imposed on the company</li> <li>• For individuals – fines ranging from 6,000 to 6,000,000 UFIRs (approximately US\$2,256 to US\$2,256,000)</li> <li>• Half-page publication of the summary sentence in court-appointed paper</li> <li>• Company's partial discontinuance</li> <li>• Annotation of the violator on the Brazilian Consumer Protection List</li> </ul>

\* U.S. dollar equivalents based on currency conversion rates in effect in January 2004.

Regulated Conduct	Merger Controls	Sanctions
<ul style="list-style-type: none"><li>• to impose prices or other terms or conditions of sale on distributors, retailers or representatives of products or services;</li><li>• to discriminate against purchasers or suppliers of a certain product or service by establishing price differentials or discriminatory conditions of sale;</li><li>• to refuse to sell a certain product or service in accordance with regular business practices and policies;</li><li>• to sell products below cost unjustifiably;</li><li>• to condition the sale of one product or service on the acquisition of another.</li></ul>		

## CHILE

Regulated Conduct	Merger Controls	Sanctions
<p>To the extent tending to impede free competition,</p> <ul style="list-style-type: none"> <li>• conduct relating to production, such as quotas, reductions or suspensions;</li> <li>• conduct relating to transportation;</li> <li>• conduct relating to marketing or distribution, wholesale or retail, such as quotas, market division, and exclusive distribution arrangements;</li> <li>• conduct involving the determination of prices of goods or services;</li> <li>• conduct affecting the right to work or the freedom of workers to organize, assemble, or negotiate collectively; and</li> <li>• generally, any arbitrary act or agreement having the purpose of eliminating, restricting, or impeding competition.</li> </ul>	<ul style="list-style-type: none"> <li>• No specific filing requirements.</li> <li>• Transactions with significant anti-competitive effects may be deemed illegal and subject to sanctions, including fines, remedial measures, and even criminal prosecution. For this reason, parties to large business combinations, particularly in critical economic sectors, occasionally seek advisory opinions from the anti-trust authorities.</li> </ul>	<ul style="list-style-type: none"> <li>• Nullification of any act, contract, arrangement, or agreement deemed to be in violation of free competition</li> <li>• Disqualification from serving in labor or trade unions</li> <li>• Fines up to 10,000 monthly tax units (approx. US \$518,800)*</li> </ul>

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## COLOMBIA

Regulated Conduct	Merger Controls	Sanctions
<p>a. contracts, agreements, concerted practices, or conscious parallel conduct among two or more enterprises if they have as their purpose or effect:</p> <ul style="list-style-type: none"> <li>• fixing prices directly or indirectly;</li> <li>• establishing discriminatory sale or marketing conditions for third parties;</li> <li>• dividing markets among producers or distributors; (iv) assigning production or supply quotas;</li> <li>• assigning, dividing or restricting sources of supply of resources; (vi) limiting technical development;</li> <li>• conditioning the supply of a product upon the acceptance of additional obligations extraneous to the purpose of the transaction;</li> <li>• withholding production of goods or services or affecting their level of production;</li> <li>• collusion or price fixing in bidding or allocating contract awards.</li> </ul> <p>b. violation of consumer protection rules regarding advertising.</p> <p>c. influencing an enterprise to increase the prices of its goods or services or to desist from lowering such prices,</p> <p>d. refusal to sell to an enterprise or discriminate against an enterprise in retaliation against its pricing policies and</p> <p>e. abuse of a dominant position in a market, as evidenced by, <i>inter alia</i>, predatory pricing, price discrimination or tying.</p>	<ul style="list-style-type: none"> <li>• Notification required if               <ul style="list-style-type: none"> <li>◦ the combined business would represent more than 20% of the relevant market, measured in terms of annual sales for the year preceding the year of the transaction, or</li> <li>◦ their combined assets as of the date of the transaction exceed 50,000 minimum monthly wages ("MMW") (approximately US\$6,065,000).*</li> </ul> </li> <li>• Filing must be made before the closing of the transaction.</li> <li>• Transaction deemed approved if Superintendent does not object within 30 days from filing.</li> </ul>	<ul style="list-style-type: none"> <li>• Cease and desist orders</li> <li>• Fines up to the equivalent of 2000 MMW (approximately US\$242,600)</li> <li>• Fines up to the equivalent of 300 MMW (approximately US\$36,400) upon managers, directors, legal representatives, and other parties authorizing infringement</li> </ul>

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## MEXICO

Regulated Conduct	Merger Controls	Sanctions
<p>a. <b>Absolute monopolistic practices (always prohibited):</b></p> <ul style="list-style-type: none"> <li>• fixing prices;</li> <li>• limiting production or distribution;</li> <li>• dividing markets;</li> <li>• bid rigging.</li> </ul> <p>b. <b>Relative monopolistic practices (prohibited only if the actor has “substantial power” over the “relevant market.”):</b> agreements or combinations the purpose or effect of which is to unduly impede market access to third parties or give exclusive advantages to certain persons, in the following cases:</p> <ul style="list-style-type: none"> <li>• between non-competitors, (i) exclusive distribution arrangements and (ii) obligations not to compete;</li> <li>• resale price controls;</li> <li>• tying arrangements;</li> <li>• conditioning sales or other transactions on obligations not to deal with certain third parties;</li> <li>• refusal to deal with certain parties;</li> <li>• concerted action to pressure or retaliate against customers or suppliers.</li> </ul>	<ul style="list-style-type: none"> <li>• Notification required if <ul style="list-style-type: none"> <li>◦ transaction value exceeds 12 million times the daily minimum wage for the Federal District (“DMW”), or approximately US\$48,366,000*;</li> <li>◦ transaction involves the accumulation of more than 35% of the assets or shares of a person or enterprise with assets or sales exceeding 12 million DMW (approximately US\$48,366,000); or</li> <li>◦ transaction involves (i) persons or enterprises whose combined assets or yearly sales exceed 48 million DMW (approximately US\$193,463,000) and (ii) an accumulation of assets or capital exceeding 4.8 million DMW (approximately US\$19,346,300).</li> </ul> </li> <li>• Notification must be filed prior to closing of transaction.</li> <li>• The Commission has a period of 45 calendar days from the date of the notice or from such later date on which any additional requested information was received, in which to respond. If the Commission does not respond during such 45-day period the transaction will be deemed approved.</li> </ul>	<ul style="list-style-type: none"> <li>• Order to suspend, correct or eliminate the practice</li> <li>• Fine of up to 7,500 DMW (approximately US\$30,200)</li> <li>• Fines of up to 225,000 DMW (approximately US\$906,900) for having engaged in relative anti-competitive practices</li> <li>• Fines of up to 375,000 DMW (approximately US\$1,511,400) for absolute monopolistic practices</li> <li>• Fines of up to 10% annual sales of infringer</li> </ul>

\* U.S. dollar equivalents based on currency conversion rates in effect in January 2004.

## PERU

Regulated Conduct	Merger Controls	Sanctions
<p>a. Abuse of dominant position:</p> <ul style="list-style-type: none"> <li>• unjustified refusal to satisfy demand for purchase or acquisition of goods or services</li> <li>• application of discriminatory terms for similar services that place some competitors at a disadvantage with regards to others.</li> </ul> <p>b. Anti-competitive practices:</p> <ul style="list-style-type: none"> <li>• direct or indirect collusion among competitors to fix prices or other terms of trade;</li> <li>• division of the market or supply sources;</li> <li>• application of production quotas;</li> <li>• agreement upon product quality when it does not relate to technical standards;</li> <li>• application in business practices of discriminatory terms for similar services which place some competitors at a disadvantage with regards to others; and</li> <li>• collusion to limit or control production, technical development, or investment.</li> </ul>	<ul style="list-style-type: none"> <li>• No merger controls except in electricity sector.</li> <li>• Companies in electricity sector require INDECOPI approval prior to closing if the parties to the transaction jointly control <ul style="list-style-type: none"> <li>◦ 15% of the relevant market if the transaction is horizontal (i.e., among competitors);</li> <li>◦ 5% of any of the relevant markets if the transaction is vertical (i.e., among parties at different levels of the production-transmission-distribution chain).</li> </ul> </li> <li>• A transaction requiring approval that is carried out without approval has no legal effect, and may result in fines of up to 10% of the sales or gross revenues of the violator(s) for the prior year.</li> </ul>	<ul style="list-style-type: none"> <li>• Fines up to 1,000 <i>Unidades Impositivas Tributarias</i> ("UITs") (approximately US\$898,550)</li> <li>• For serious fines, a fine greater than 1,000 UITs (approximately US\$898,550)</li> <li>• Fines up to 100 UITs (approximately US\$89,850) for legal representatives or directors</li> </ul>

## VENEZUELA

Regulated Conduct	Merger Controls	Sanctions
<p>Conduct and agreements that limit free competition, including:</p> <ul style="list-style-type: none"> <li>• attempting to obstruct the entry of firms, goods, or services into market;</li> <li>• manipulating factors of production, distribution, technological development or investment in a manner harmful to free competition;</li> <li>• agreements among members of trade associations, cooperatives, unions and similar organizations to restrict competition among themselves;</li> <li>• agreements or concerted conduct to fix prices, limit production or distribution, divide markets, price discrimination or tying arrangements;</li> <li>• abuse of dominant position.</li> </ul>	<ul style="list-style-type: none"> <li>• Filing is voluntary.</li> <li>• In no event is a transaction subject to review if the parties' combined total annual business volume is less than 120,000 Tax Units (approximately US\$1,457,700).*</li> <li>• If notification is given, ProCompetencia has up to 4 months from the filing date to rule, and may approve the transaction without qualification, approve it subject to certain conditions, or reject it.</li> </ul>	<ul style="list-style-type: none"> <li>• Monetary Sanctions depending on the form and scope of the restriction; the size of the market affected; the market share of the corresponding person subject to law; the impact of the restriction of competition on other actual or potential competitors, on other parts of the economic process, and on consumers and users; the duration of the restriction on consumers and users; the duration of the restriction on free competition; and the frequency of repeat offenses.</li> </ul>

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